70-5138

In the Supreme Court of the United States

[redacted]

October Term, 1970

MITCHELL EPPS et al.,
Appellants

v.

AMERICO V. CORTESE et al.,
Appellees

On Appeal From the United States District Court for the Eastern District of Pennsylvania

BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA—APPELLEE

J. SHANE CREAMER
Attorney General
PETER W. BROWN
Deputy Attorney General
For the Commonwealth, Appellee

State Capitol
Harrisburg, Pennsylvania 17120

Murrelle Printing Co., Law Printers, Box 100, Sayre, Pa. 18840

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STATEMENT

Suit was commenced in this matter by appellants, plaintiffs below, on September 18, 1970 in the U.S. District Court for the Eastern District of Pennsylvania. Notice of the filing of the action, of subsequent hearings, motions and stipulations were duly served on the former Attorney General of the Commonwealth of Pennsylvania by appellants pursuant to 28 U.S.C. Section 2284. The former Attorney General elected to take no action in the court below and did not appear at any hearing or file any formal court papers.

Subsequently the prior administration terminated office on January 20, 1971 and the present administration took office. By this time all proceedings below had been completed and the litigation awaited only a determination by the court. In due course, copies of the opinion below, the notice of appeal of appellants, and appellants' Jurisdictional Statement were received. A review of the file at that time, led to a determination that it would be in the best interests of the citizens of the Commonwealth to participate in this matter on behalf of the appellants. On May 25, 1971, the present Attorney General notified this Court of its concurrence in appellants' request that probable jurisdiction be noted.

The Department of Justice of the Commonwealth of Pennsylvania is faced with another harsh and patently unconstitutional creditor's remedy in this case. The use of replevin with bond has enabled creditors to deprive citizens of this Commonwealth of the use and possession of their

property without notice and opportunity to be heard. As the officer of the Commonwealth charged with the responsibility of upholding the Constitution of the United States and the direction and supervision of the Pennsylvania Bureau of Consumer Protection, the Attorney General believes that the rights of all consumers must be closely guarded and protected from the kind of abuse caused by use of replevin with bond. Under the law presently in effect, any individual may, at any time, compel the sheriff to serve a writ of replevin upon any other individual and to take possession of the property of that individual merely by filing with the prothonotary of the Court of Common Pleas four simple pieces of paper. The individual taking action need only appear and file a notice of appearance; a praecipe for a writ, which simply requests that a writ issue; an affidavit as to his belief of the value of the property; and a bond in double that amount. Neither the sheriff nor the prothonotary are ever informed, and may not request information concerning the reason for the seizure. State Rules of Civil Procedure require that on direction of the plaintiff the sheriff "shall take possession of the property". Pennsylvania Rules of Civil Procedure, Rule 1074(b). Even after the taking, the defendant in the action is never informed of the reasons therefor unless he begins a court proceeding of his own to compel such disclosure.

The present Attorney General, therefore, respectfully submits that the statutes and rules of Pennsylvania authorizing writ of replevin with bond are unconstitutional on their face and that the court below erred in granting summary judgment on behalf of the defendants below.

ARGUMENT

THE COURT BELOW ERRED IN FOCUSING ON THE PARTICULAR FACTS BEFORE IT AND DISREGARDED THE BROAD SCOPE OF THE STATUTORY LANGUAGE

Action in the court below was brought by plaintiffs as a class action on behalf of all residents of Pennsylvania who might be affected by the unconstitutional use of the statutes and rules here in question. The Court below properly ruled that since plaintiffs were attacking the statutory language on its face it was unnecessary to rule on the question of propriety of the class action. If the Court were to find the statutes and rules unconstitutional on their face, they would as a matter of course fall as to all individuals.

After making this statement, however, the Court proceeded to analyze the statutes and rules as applied to the plaintiffs then before the Court. In fact, the Court limited its analysis to the factual situation facing two of the named plaintiffs. If the constitutionality of these statutes are to be considered on their face, the factual situations of any plaintiff or group of plaintiffs becomes irrelevant. Plaintiffs in their memoranda filed below made clear their position that the "facts relating to the merits of the named plaintiff's individual cases are irrelevant and merely serve to cloud the issue at bar." *Plaintiffs' Supplementary Memorandum in Support of Their Motions for Preliminary*

Injunction and Summary Judgment, at 1. The Court below refused to test the statutes solely on their merits and insisted that a ruling must be based not only on the face of the statutes and rules in question but in addition "in light of the present record." 326 F. Supp 127, 136. The Court refused to look at what it called "hypothetical circumstances of undue hardship not presently before the court." *Ibid* On the other hand, in the same page of its opinion, the Court in a footnote considers a "hypothetical circumstance" in which immediate action is necessary." *Id.* at 136, footnote 9.

The Court below, unfortunately indulged in a kind of reasoning which this Court has rejected on numerous occasions in the past. It has refused to consider the plea of a plaintiff who has boldly attacked the constitutionality of the statutes before it. In *Coe v. Armour Fertilizer Works*, 237 U.S. 413 (1915), this Court was faced with an opinion of the Supreme Court of Florida which refused to look into the constitutionality of an Act on behalf of an individual when it felt that that individual was not prejudiced by the possible unconstitutionality. The Florida Supreme Court stated that:

> "The statute presents many difficulties, that may arise as to others not similarly situated, and may as such be beyond the power of the legislature; but the party now before this court has not brought himself within the class who may justly complain, and the judgment as to him, upon the authority of our former holding, is, therefore, affirmed." *Id.* at 418.

The reasoning of the Florida Court was rejected, and this Court firmly stated:

"But, it is said, that plaintiff in error is not within that class . . . The fallacy of this is that it ignores the issue of law raised by the petition of plaintiff in error, and substitutes an issue of fact for which it was not summoned and which he has not consented to litigate. To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon merits. Rees v. Watertown, 19 Wall. 107, 123." *Id.* at 424.

In the later case of *Wuchter v. Pizzutti,* 276 U.S. 13 (1928), this Court was asked to consider the validity of a New Jersey non-resident motorist statute which authorized service of process upon a non-resident by serving a copy of the complaint on the Secretary of the State of New Jersey. The statute made no provision for actual notice to the defendant. In the case actually before the New Jersey Court, Wuchter, a Pennsylvania resident, was personally served in Pennsylvania with a copy of the complaint against him. Wuchter, although in receipt of actual notice of the hearing in New Jersey, failed to appear, and allowed a default judgment to be entered against him. He then appealed, claiming that lack of a provision in the statute for an actual notice rendered the statute unconstitutional. The New Jersey Court ruled against Wuchter, but this Court reversed. Since Wuchter's attack was one of law and not of fact, this Court looked only to the law as it was contained in the statute. The opinion states:

"But it is said that the defendant here had actual notice by service out of New Jersey in Pennsylvania. He did not, however, appear in the cause and such

notice was not required by the statute. Not having been directed by the statute it can not, therefore, supply constitutional validity to the statute or to service under it." (Citations omitted) *Id.* at 24.

This Court refused to uphold the statute stating that:

> "A provision of law . . . that leaves open such a clear opportunity for the commission of fraud (Heinemann v. Pier, 110 Wis. 185) or injustice is not a reasonable provision, and in the case supposed would certainly be depriving the defendant of his property without due process of law."

In the very recent case of *Sniadach v. Family Finance Corp. of Bay View,* 395 U.S. 337 (1969), this Court considered the rejection by the Supreme Court of Wisconsin of an attack on the constitutionality of Wisconsin statutes covering pre-judgment garnishment of wages. The Wisconsin Court opened its opinion with an attack on the type of action brought by Mrs. Sniadach:

> "Appellant attacks the constitutionality of Wisconsin's garnishment before judgment statutes, . . . on a number of grounds based on injustices and deprivations which have been, or are likely to be, suffered by others, but which she has not personally experienced."
>
> *Family Finance Corp. of Bay View v. Sniadach,* 37 Wis. 2nd 163, 166; 154 N.W. 2d 259, 261 (1967).

The Court refused to consider her claim that in many cases there is, in fact no merit to the garnishment action on the grounds that "her affidavit in support of the order to show cause contains no allegation that she is not in-

debted thereon to plaintiff" or her allegation that provisions for the posting of a bond are unfair to the poor, on the grounds that "appellant has made no showing that she is a person of low income and unable to post a bond;" and her attack on the grounds that many wage earners lose their employment because of a garnishment, on the grounds that "appellant, however, has made no showing that her own employer reacted in this manner." 37 Wis. 2d at 167, 154 N.W. 2d at 261-262. This Court again, as it has in the past, objected to this narrow reasoning and found the statute unconstitutional on many of the grounds raised by Mrs. Sniadach and rejected below.

If the statutes now before the court are unconstitutional on their face, the factual situations presented by the named plaintiffs are immaterial and irrelevant. That the statutes and rules here in question provide for the taking of property before notice of hearing, is clearly evident.

THE COURT BELOW ERRED IN NOT HOLDING THAT THE STATUTES AND RULES PROVIDING FOR REPLEVIN WITH BOND ARE UNCONSTITUTIONAL IN THAT THEY DEPRIVE INDIVIDUALS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW

The operations of the statutes and rules in question have been stipulated to by the parties before the court below and are set forth in the court's opinion on pages 129 and 130. Briefly and simply stated, these statutes and rules provide for the taking of property by any individual, from any other individual, by court order, without prior notice, hearing, or any judicial determination. The Prothonotaries of the Courts of Common Pleas in Pennsylvania are required to issue writs at the request of any individual who files the proper papers. They are not entitled to, and may not request information concerning the justification for such taking. The Writ, once issued by the Prothonotary is required to be executed forthwith by the Sheriff and the Sheriff is required to take the property set forth in the Writ with or without the consent of the individual who has the possession of the property. No notice of the taking is given before the actual seizure. No notice for the reason of the seizure is given at the time of the seizure or at any time thereafter unless defendant on the Writ files a Praecipe which demands that plaintiff on the writ file a complaint. Property not recovered within three days by the posting of a bond is subject to deprivation, at least until the termination of all court proceedings. It is almost impossible to conceive a more harsh and unreasonable deprivation of property.

The Court below's defense of this procedure is built around its conclusions contained in a paragraph of its opin-

ion, 326 F. Supp. at 135. The Court finds that the service of the Writ provides the defendant with sufficient "actual notice of the pendency of another's claim to a possessory interest in a specific property involved." The property, it finds, "is not automatically and forever dispossessed", nor is it "forthwith delivered to the plaintiff on the writ." Plaintiff may, if he acts within 72 hours, retain possession upon the filing of a bond.

The Court below precedes this explanation with a lengthy discourse on the differences between the property involved in the instant case and the property involved in *Sniadach* and *Goldberg v. Kelly*, 397 U.S. 254 (1970). These distinctions, whether they are correct or not, become meaningless, if the property taken is secured other than by due process of law. All of an individual's property is protected by the constitution against a taking without constitutional safeguards, and the quantity and quality of that property are immaterial.

The statements of the Court below are clearly insufficient in light of prior decisions of this Court. The proposition that notice is sufficient if given at the time of the taking and if the taking is only temporary is soundly rejected by Mr. Justice Harlan in his concurring opinion in *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 343 (1969):

> "From my standpoint, I do not consider that the requirement of 'notice' and 'hearing' are satisfied by the fact that the petitioner was advised of the garnishment simultaneously with the garnishee, or by the fact that she will not permanently lose the garnished property until after a plenary adverse adjudication of the underlying claim against her, or by the fact

> that relief from the garnishment may have been available in the interim under less than clear circumstances."

Unlike the situation presently before the Court the statutes in the *Sniadach* case provided for notice of the reason for taking at the very time of taking, and provided, as a matter of course, for a hearing on the merits of the claim.

In the matter of *Coe v. Armour Fertilizer Works,* 237 U.S. 413 (1915), the lower Court found no deprivation of due process rights, since defendant, Mr. Coe, was notified of the action against him at the time of levy and before any actual taking, and could prevent actual physical deprivation by instituting an action and raising meritorious defenses. This Court found sufficient lack of due process where a levy preceded notice and hearing and where defenses could be raised only through independent action of defendant below:

> "The suggestion that because, . . . a hearing upon pertinent questions of fact may be had at the instance of the alleged stockholder after the execution issues and before interference with his possession of his property right, therefore plaintiff in error, having been at liberty in this proceeding to raise meritorious questions, is not 'within the class who may justly complain,' will not withstand critical analysis." *Id.* at 423.

A hearing granted, as here, only after the taking, and only upon the specific request of the defendant on the writ cannot withstand the test of constitutionality. The statutes in question which provide for only such a hearing must fall.

THE COURT BELOW ERRED IN NOT HOLDING THAT THE STATUTES AND RULES WHICH PROVIDE FOR THE ISSUANCE OF WRIT OF REPLEVIN WITH BOND ARE UNCONSTITUTIONAL ON THE GROUNDS THAT THEY PERMIT UNREASONABLE SEARCHES AND SEIZURES IN VIOLATION OF THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Defendant Sheriff of the Court of Common Pleas of Philadelphia is required by law once having received a Writ of Replevin with Bond from the plaintiff on the Writ to "take possession of the property". Penna Rules of Civil Procedure, Rule 1074. All parties to this action agree, and the court notes in its opinion, 326 F. Supp at 129:

> "the Sheriff, or his agents, when executing upon a Writ of replevin with bond, is required to enter the home of the defendant on the writ and to seize with or without consent of the defendant any and all of the property named in the writ."

The Court below finds the procedure below proper on three grounds; it suggests that the plaintiff may have waived their Fourth Amendment rights in signing a conditional sales agreement, that Fourth Amendment rights do not apply to civil process, and that looking at the plaintiffs before it, it finds that forcible entry did not, in fact, occur in the cases presented.

There can be no question, but that the Courts of Pennsylvania, have for many years permitted a sheriff to use force if necessary to seize property named in a writ

of replevin. Seventy years ago the Court of Common Pleas of Philadelphia stated that:

> "In a writ of replevin the command to take the goods of a plaintiff who has entered security for their return . . . and, under the common law and statute, the sheriff may break outer doors or enter by unusual ways for the purpose of executing under writ."
>
> *Jones v. Herron,* 12 Pa. C. C. 183 (Philadelphia County C. C. 1891).

See also *Commonwealth v. Temple,* 38 D. & C. 2d 120 (Centre County Q.S. 1965); and *Commonwealth v. Valvano,* 33 D. & C. 128 (Lackawanna County Q.S. 1936).

The Court's suggestion that waiver may be implied from the conditional sales contract is clearly erroneous on two grounds. First the statute does not limit instances in which a taking may occur to those where defendants on the writ have signed conditional sales agreements. Secondly, even if it were so confined, the language of the contract must be stretched beyond its reasonable breaking point in an effort to read such language into its contents. Nowhere is such a waiver even hinted. The well known presumption of this Court that the waiver of a fundamental constitutional right will not be lightly inferred, *Johnson v. Zerbst,* 304 U.S. 458 (1938), must be rewritten to provide a strong presumption in favor of the presumption of waiver of the most fundamental constitutionally provided rights.

In addition, the Court questions the applicability of the Fourth Amendment protections to summary civil process to satisfy debt. Again, the Court below rejects

clear statements of this Court to the effect that the Fourth Amendment protects all citizens, in all circumstances. In *Weeks v. United States,* 232 U.S. 383 (1914), it was clearly stated that:

> "This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws." *Id.* at 92.

In a more recent case of *Camera v. Municipal Court,* 387 U.S. 523 (1967), the ruling of the Court below was again rejected:

> "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." *Id.* at 530.

Finally, the Court below again narrows its vision to the specific facts as it sees them presented by the individual plaintiffs. The Court finds that there was a lack of physical force in any of the cases presented, equates this lack of violence with consent, and holds the seizures to be reasonable. Clearly, the Court cannot properly equate consent with the surrender of a private individual of his property to the order of an official of the Court armed with the process of that Court. Even if the Court were correct, and consent had been given in individual cases presented, the statute on its face permits a taking without consent and, in fact, permits the use of physical force in an effort to secure that taking.

The statutes and rules in question do not limit the time during which a seizure may be made, or the manner

in which it may be accomplished, statutory language alone is controlling and the statute must fail for the lack of limiting language which will assure a taking only after consent, knowingly, intelligently and voluntarily given.

CONCLUSION

For all the reasons stated above, the Commonwealth of Pennsylvania joins with the Appellants, respectfully praying that the judgment of the Court below be reversed, and that this Court enter a judgment declaring the Pennsylvania Statutes and Rules which set forth the procedures establishing Replevin with Bond unconstitutional on their face.

J. SHANE CREAMER
Attorney General
PETER W. BROWN
Deputy Attorney General
Attorneys for the Commonwealth
of Pennsylvania, Appellee

August 7, 1971